Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts	)	CC Docket No. 01-09

VERIZON'S OPPOSITION TO WORLDCOM'S MOTION FOR A STAY PENDING JUDICIAL REVIEW

The Commission should reject WorldCom's desperate attempt to deny consumers in Massachusetts the benefits of added long distance competition: it should reject WorldCom's request for a stay of this Commission's order approving Verizon's Application for long distance relief in that State.

WorldCom's motion boils down to a rehashing of single claim: that the rates for unbundled local switching in Massachusetts — the same rates that were approved in New York in the face of an identical attack — are too high. Yet this is the same claim that WorldCom and other long distance incumbents have lost on at least *five* separate occasions — before the New York PSC, before a federal district court in New York, before this Commission, and twice before the D.C. Circuit.[1] Indeed, when the Commission approved Verizon's New York application, the

[1] *See* Evaluation of the New York Public Service Commission at 156-157, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (filed Oct. 19, 1999); Memorandum – Decision and Order at 26, *MCI Telecommunications Corp. v. New York Telephone*, No. 97-CV-1600 (N.D.N.Y. Mar. 7, 2001); *Application by Bell Atlantic*

D. C. Circuit denied a stay request predicated on the very claims relied on by WorldCom here, and then rejected those same claims on the merits. WorldCom therefore could not possibly show *any* likelihood that it will succeed on appeal by merely rehashing those claims yet again.

Even disregarding the utter lack of any likelihood of success on the merits, WorldCom still could not be entitled to a stay. The simple fact is that whatever supposed "harm" WorldCom might suffer from the introduction of a new competitor pales in comparison to the very real harm that Verizon and the public would suffer if a stay were granted. *First*, having opened its local markets, Verizon is now losing customers at a rapid rate. Indeed, competitors already serve proportionately more lines in Massachusetts than in any other state at the time section 271 approval was granted, and are adding tens of thousands more each month. A stay would preclude Verizon from competing on the same basis with these competitors (who are able to offer a bundled service that includes both local and long distance), despite the fact that it demonstrably has earned the right to do so. *Second*, the Commission has already correctly determined that Verizon's immediate entry into the Massachusetts long distance market promotes the public interest. Indeed, Verizon's entry in New York has already saved those New Yorkers that chose Verizon as their long distance carrier *nearly $200 million* — especially the mass-market customers that WorldCom and the other long distance incumbents largely ignored — and has led to even further local competition to boot.

Accordingly, WorldCom can show neither that it is likely to prevail on the merits nor that the balance of the equities tips in its favor. WorldCom's motion must therefore be denied.

New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 246 (1999) ("*New York Order*"); Order, *AT&T Corp. v. FCC*, No. 99-1538 (D.C. Cir. Jan. 4, 2000); *AT&T Corp. v. FCC*, 220 F.3d 607, 617-618 (D.C. Cir. 2000).

ARGUMENT

In considering whether a stay pending appeal is appropriate, this Commission uses the familiar test of *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), under which it evaluates four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Station KDEW(AM)*, Memorandum Opinion and Order, 11 FCC Rcd 13683, ¶ 6 (1996). "A petitioner must satisfy each of these four tests in order for the Commission to grant a stay." *Petition of the Connecticut Department Public Utility Control*, Order, 11 FCC Rcd 848, ¶ 14 (1995). With respect to each of the four factors, the movant "must make a convincing showing." *Implementation of Section 309(j) of the Communications Act*, Order, 14 FCC Rcd 16511, ¶ 9 (1999). WorldCom has made no showing at all — much less a convincing showing. Nor could it. And that is precisely why both this Commission and the D.C. Circuit denied a stay request in the New York proceeding that was predicated on fundamentally the same claims that WorldCom relies on here.

I. IT IS INCONCEIVABLE THAT THE ORDER WILL BE REVERSED ON APPEAL.

WorldCom claims the *Massachusetts Order* is likely to be reversed on appeal for only one reason. Its argument, however, is merely a rehash of the same erroneous claims that have been rejected on at least five prior occasions. Based upon an enormous record compiled both in this proceeding and in the New York proceeding where the same issues first arose, the Commission again carefully considered WorldCom's arguments and rejected them in the course of a well-reasoned order spanning nearly 150 pages. And this Commission has previously made clear that a party seeking a stay cannot establish a likelihood of success on the merits by relying "principally on arguments already considered [and rejected] by the Commission." *Id.* ¶ 15. That rule alone bars any finding of likely success here. *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Order, 15 FCC Rcd 75, ¶ 2 (1999) (rejecting AT&T's motion to stay order granting Verizon section 271 approval in New York, finding that AT&T's motion "fails to raise any argument that was not fully considered and addressed by the Commission" in its order).

Even disregarding that rule, however, WorldCom's claims still fail. WorldCom's claims must overcome extensive deference on appeal, where the only issue will be whether the Commission abused its discretion when it again concluded that the same rates approved in the New York proceeding fall within the broad range that TELRIC could produce. *See, e.g., AT&T v.* FCC, 220 F.3d at 616 (outlining the reasons that the nature of the claims at issue here "call for special deference to the FCC"). That deference will be particularly broad here given that the very claims on which WorldCom relies were rejected not only by this Commission, but also by the New York PSC, a federal district court, and the D.C. Circuit itself. WorldCom therefore could not possibly show a likelihood of success on the merits.

WorldCom's principal claim is that the Commission applied the wrong standard in reviewing Verizon's rates. It claims that the Commission somehow erred by failing to consider whether Verizon's rates "in fact allow competitive entry" or "permit competition to develop." Motion at 14, 21-23. But as the Commission has consistently held since 1996, and as the D.C. Circuit has affirmed, the only relevant question under the Act is whether Verizon's rates fall "within the range that a reasonable application of TELRIC principles would produce." *Massachusetts Order* ¶ 27; *see AT&T Corp. v. FCC*, 220 F.3d at 615 (the FCC "assesses only whether [the rates at issue] comply with basic TELRIC principles"). WorldCom comes nowhere close to demonstrating that it is likely to succeed in overruling this well-settled standard.

WorldCom's other claims involve the *application* of the Commission's well-settled pricing standard to the facts here — determinations, which, as noted above, are subject to a second measure of deference. *First*, WorldCom repeats its argument that Verizon's unbundled switching rates were not supported by cost studies. *See* Motion at 13-14. But the simple fact is that the rates were based on extensive cost studies during the New York proceeding and were set based on a cost study by the New York PSC's own staff. And here, as the Commission found, Verizon "submitted evidence demonstrating that its switching costs in Massachusetts are the same as or higher than its switching costs in New York," which was supported by "cost studies based on the same assumptions . . . for Massachusetts and New York." *Massachusetts Order* ¶ 26.

Second, WorldCom repeats its claim that the Commission should not have compared the rates in Massachusetts to those in New York, but rather to the rates in other states (*e.g.*, Texas, Kansas, and Oklahoma) that WorldCom claims are lower. *See* Motion at 2, 17-18. As the Commission repeatedly has found, however, there are a "range" of rates that can result from a reasonable application of its TELRIC rules. *See, e.g.*, *New York Order* ¶ 244. The D.C. Circuit has agreed, emphasizing that "enormous flexibility is built into TELRIC." *AT&T v. FCC*, 220 F.3d at 616. In fact, the Commission itself previously concluded that the range for unbundled local switching may vary by as much as a factor of two. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 811 (1996) (finding range between 0.2 cents and 0.4 cents per minute a reasonable default proxy). This puts the lie to WorldCom's claim that the Massachusetts rates cannot be cost based simply because they are supposedly double the rates approved in other states. *See* Motion at 2, 6, 17-18. And here, of course, the Commission found that Verizon's rates "are at present within the range that a reasonable application of TELRIC principles would produce." *Massachusetts Order* ¶ 27. Moreover, the Commission's determination to rely on the New York rates (rather than the rates from some other state) was entirely appropriate, and consistent with its own precedent, because Massachusetts and New York "are adjoining, they have similar rate structures, the Commission has found the New York rates are within a zone that is consistent with TELRIC . . . , and it is the same BOC in both states." *Id.* ¶ 28.

Finally, WorldCom repeats its collateral attack on the New York rates, claiming that those rates are improperly based on based on misstatements by Verizon regarding its discounts on new switches. *See* Motion at 18-19. But the New York PSC, this Commission, and the D.C. Circuit all have noted that Verizon's switching rates were not based on Verizon's own studies, but rather "grounded on an analysis undertaken by the NYPSC's Staff."[2] Moreover, they all have agreed that, once Verizon's error was identified, the PSC could not simply make a "selective update" or "simple arithmetic correction" to Verizon's switching rates because any change in the assumption regarding discounts would affect other assumptions "with unpredictable results."[3] Indeed, the PSC noted that "[o]nce switching costs were reopened, one might also envision changes to the Staff analysis that would *increase* the calculated switching

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[2] New York PSC Reply Evaluation at 48, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (filed Nov. 8, 1999); *see also New York Order* ¶ 242; *AT&T Corp. v. FCC*, 220 F.3d at 617.

[3] Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding, Cases 95-C-0657, *et al.* at 8, 10 (NYPSC Sept. 30, 1998).

costs."[4] And they all have concluded that, even if new evidence regarding Verizon's switch discounts might result in a refinement of Verizon's rates in the ongoing proceedings being conducted by the Massachusetts DTE, the existing rates are "no less TELRIC-compliant" as a result.[5]

WorldCom's motion does not prove the Commission wrong on any of these points, and in light of the extra level of deference that the court will accord the Commission's decision, each of WorldCom's highly factual arguments must fail.

II. BOTH THE PRIVATE EQUITIES AND THE PUBLIC INTEREST MILITATE STRONGLY AGAINST A STAY.

Even if WorldCom had succeeded in showing a likelihood of success on the merits, it would still not be entitled to a stay. Indeed, WorldCom's claims relating to the balance of the equities are likewise no different than those relied on by AT&T when its own request for a stay of the *New York Order* was rejected.

A. The Private Equities Militate Strongly Against a Stay.

WorldCom claims that Verizon's entry will cause it to lose customers, thereby, presumably, causing it to forgo profits that it will be unable to recoup in the unlikely event that it were to prevail on appeal. *See* Motion at 24-26. But "[a] party moving for a stay is required to demonstrate that the injury claimed is both certain and great." *Cuomo v. NRC*, 772 F.2d 972,

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[4] *Id.* at 10-11; *see also New York Order* ¶ 245 (finding that "AT&T has presented no evidence to persuade us that New York did not conform to TELRIC principles simply because it failed to modify one input into its cost model"), *aff'd, AT&T Corp. v. FCC*, 220 F.3d at 617-618 ("Under these circumstances, we are comfortable deferring to the Commission's conclusion that basic TELRIC principles have not been violated.").

[5] *New York Order* ¶ 247 (quoting New York PSC Reply Evaluation at 47); *AT&T Corp. v. FCC*, 220 F.3d at 617 (the Commission's "conclu[sion] that the prospect of future modification makes the rates no less TELRIC-compliant . . . seems reasonable to us").

976 (D.C. Cir. 1985) (internal quotation marks omitted); *see also Expanded Interconnection with Local Tel. Co. Facilities*, Order, 8 FCC Rcd 123, ¶ 8 (1992) ("*Expanded Interconnection Order*"). "The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977). WorldCom cannot possibly make the showing required under these standards.

WorldCom claims that Verizon's entry is "harming" WorldCom by competing for WorldCom's "long distance base." Motion at 25. But WorldCom's only argument for why Verizon is different from the various other long distance providers goes right back to the claim that Verizon's prices for unbundled local switching are too high. *See id.* at 24 (claiming that, because of Verizon's UNE rates, WorldCom cannot provide bundled local and long distance services to residential customers). Thus, WorldCom's irreparable harm claim "is inextricably linked with the merits of the case," *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998), and its attempt to demonstrate a risk of irreparable injury fails for precisely the same reasons that it cannot show a likelihood of success on the merits.

Nor is there any basis for WorldCom's assertion that it will be irreparably harmed without a stay because Verizon will have less incentive to resolve any problems WorldCom might have in entering the local market. *See* Motion at 26. The Commission found that Verizon's Performance Assurance Plan and its own continuing authority under section 271(d)(6) would prevent any "backsliding" after approval. *See Massachusetts Order* ¶¶ 236, 250-252. And the undisputed record in this proceeding demonstrates that competition has continued to thrive in New York following Verizon's entry there. Competitors in New York now serve more than 3 million local lines — a number that has *more than doubled* since Verizon entered the long distance business — and continue to add approximately 100,000 new local customers each month.[6]

While WorldCom's showing of harm is thus speculative and insubstantial, it is a *certainty* that Verizon will suffer serious harm if a stay is granted. Verizon will continue to lose its local customers, as a result of its efforts to open the local market in Massachusetts, while unable either to compete with the long distance carriers or with other local carriers who are able to offer consumers a full bundle of services. Verizon already has lost nearly 900,000 lines to competitors in Massachusetts — including nearly 600,000 lines being served by competitors over their own facilities — which represents about 17 percent of the lines served by Verizon itself. This level of competition is, proportionately, more than double that presented in the application for any other state where the Commission has granted long distance authority. Moreover, Verizon continues to lose about 30,000 additional lines to competitors each month in Massachusetts. And its experience in New York suggests that these losses will continue to mount. WorldCom's supposed "harm," therefore, pales in comparison to the very real harm Verizon would incur if a stay were granted. Even if WorldCom's flawed claims were to be credited, the absolute best it could hope to show is that the "balance of harms results roughly in a draw." *Serono*, 158 F.3d at 1326. Either way, a stay is inappropriate.

WorldCom's only response is that, because Verizon has been barred from long distance markets since 1984, a few additional months will not matter much. *See* Motion at 27. But that

[6] *See* Declaration of William Taylor ¶ 34, *Application by Verizon New York Inc. et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 00-100 (filed Apr. 23, 2001) ("*Taylor Connecticut Decl.*").

line of reasoning is never grounds for postponing overdue reforms,[7] and it certainly is not grounds for postponing 271 relief. As a result of Verizon's efforts in Massachusetts, "barriers to competitive entry in the local markets have been removed and the local exchange markets today are open to competition." *Massachusetts Order* ¶ 234. Congress recognized that, once a BOC has opened its local markets in reliance on the bargain set forth in section 271, it must be allowed to enter long distance markets *immediately* or it will face an unfair fight. That is why Congress imposed a 90-day deadline on this Commission's decision-making. *See* 47 U.S.C. § 271(d)(3). In light of this clear congressional directive for prompt action, a stay would be entirely inappropriate.[8]

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[7] *See, e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, Order, 12 FCC Rcd 10175, ¶ 27 (1997) (denying stay because, "[i]n a case such as this one, which involves significant and much needed reforms of access charge and price caps regulation, the burden of showing equitable entitlement to a stay is particularly heavy because of the strong public interest in implementing those reforms"); *Expanded Interconnection* Order ¶ 9 (denying stay because it "would thwart [an] important public policy objective").

[8] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 12 FCC Rcd 21872, ¶ 12 (Chief, CCB 1997) (denying stay pending appeal because, where "Congress [has set] an expedited deadline for Commission action," "the public interest is best served by the immediate implementation of the Commission's compensation rules"); *see also Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1308 (1976) (Rehnquist, Cir. J.) (vacating stay to avoid "imped[ing] Congress' intention to promote improved highway safety as expeditiously as is practicable"); *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987) (Easterbrook, J.) (denying stay because "we must take into account Congress' decision to expedite" implementation of statute); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (finding "good cause" for immediate effectiveness of rule where "the Commission was under a congressional deadline to act quickly"); *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984) (same where "both Congress and the President articulated a profound sense of 'urgency' in the need for implementation of the legislation").

B. The Public Interest Militates Strongly Against a Stay.

Even more important than the balance of private equities is the public interest. "In litigation involving the administration of regulatory statutes designed to promote the public interest, [the public interest] factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers*, 259 F.2d at 925. The statute here at issue *is* a statute "designed to promote the public interest": it states that, before granting an application, the Commission must determine that "the requested authorization is consistent with the public interest." 47 U.S.C. § 271(d)(3)(C). The Commission made just such a determination here. *See Massachusetts Order* ¶ 232 ("approval of this application is consistent with the public interest").

In addition, the Commission found that "the record confirms our view . . . that BOC entry into the long distance market will benefit consumers." *Id.* ¶ 234. Verizon's roll out of long distance service in Massachusetts on April 26, 2001 — the day after WorldCom filed its motion for a stay — bears out the Commission's conclusion. Consumer demand for the innovative and inexpensive plans that Verizon offers resulted in several thousand customers signing up on the very first day. Moreover, consumers in New York who have chosen Verizon as their long distance carrier have already saved nearly $200 million. *See Taylor Connecticut Decl.* ¶ 19. Granting a stay would frustrate the ability of these thousands of Massachusetts consumers — as well as thousands more — to obtain similar savings on their long distance bills.

Verizon's experience in New York also demonstrates that a Bell company's entry into the long distance market is the catalyst that forces long distance incumbents finally to enter local markets for mass-market customers. Verizon's entry in New York not only sparked increased competition from the long distance incumbents, but also sparked added local competition across-the-board. The number of local lines served by competitors in New York has *more than doubled* since Verizon entered the long distance business there — and competitors continue to add approximately 100,000 new local customers each month in that state. Verizon's entry into the long distance market in Massachusetts is likely to spark a similar increase in local competition.

WorldCom's only argument to the contrary (*see* Motion at 27) is based on the Commission's *Qwest* decision. *See AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998). There, the Commission issued an order enjoining Ameritech from marketing Qwest's long distance service without first obtaining 271 approval. On *that* set of facts, the Commission saw a risk "that the local and long distance markets will be changed in ways that Congress did *not* intend." *Id.* ¶ 28 (emphasis added). Here, by contrast, local and long distance markets are about to be changed in just the way Congress *did* intend: a BOC will be permitted to provide long distance service after this Commission found that it fully opened its local markets.[9] And Verizon has begun to deliver precisely the kind of benefits that Congress expected from introducing a strong new competitor to take on the Big Three long distance incumbents. The *Qwest* decision is simply inapplicable to a BOC that has received section 271 approval.

[9] *See Telmex/Sprint Communications, L.L.C.*, Order, 13 FCC Rcd 15678, ¶ 8 (Chief, Int'l Bur. 1998) (distinguishing *Qwest* on the ground that "Ameritech's actions, which the Commission stayed, had not been previously authorized by the Commission so the Commission had never addressed the question raised by AT&T of whether Ameritech's actions violated the Telecommunications Act of 1996").

CONCLUSION

For the reasons set forth above, the Commission should deny WorldCom's motion for stay pending judicial review.

Respectfully submitted,

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I, Evangelia Bantavani, hereby certify that on this 27th day of April 2001, I caused a true and correct copy of Verizon's Opposition to WorldCom's Motion for A Stay Pending Judicial Review to be served on the parties listed below via first class mail postage pre-paid unless otherwise indicated:

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